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No. 90-681

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BARBARA HAFER,

Petitioner

v.

JAMES C. MELO, JR. AND CARL GURLEY, ET AL.,

Respondents

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR THE PETITIONER

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Petitioner Barbara Hafer ("Hafer") hereby replies to the briefs on the merits filed herein by respondents and by *amici curiae* who support respondents.[1]

ARGUMENT

I. *Will v. Michigan Dept. of State Police* Expressly Holds That State Officials Acting in Their Official Capacities Are Not Subject to Liability Under 42 U.S.C. §1983.

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1. *Amicus curiae* briefs in support of respondents have been filed on behalf of Nancy Haberstroh, Ph.D.; American Civil Liberties Union and the ACLU of Pennsylvania; American Federation of Labor and Congress of Industrial Organizations; and Kenneth W. Fultz. A number of national, state and local governmental associations have joined in an *amicus curiae* brief in support of petitioner.

Nothing in the briefs of respondents and the *amici curiae* refutes the primary basis for Hafer's position;[2] that in *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 (1989), this Court expressly held that state officials *acting* in their official capacities are not "persons" under 42 U.S.C. §1983. Respondents maintain that §1983 plaintiffs may circumvent *Will* and subject state officials to personal liability for damages under that statute by the simple expedient of describing such an action as one against the officials in their personal capacities, *even if the acts alleged could only be performed by the officials acting in their official capacities.*

The limitation established by *Will* on the susceptibility of state officials to liability under 42 U.S.C. §1983 cannot be avoided by such a transparent stratagem. Although the complaint in *Will* did designate the Director of State Police as being sued in his official capacity, the Supreme Court of Michigan, in reversing the decision of the Michigan Court of Appeals that the Director of State Police was subject to liability under 42 U.S.C. §1983, squarely stated that state officials *acting* in their official capacities are not "persons" within the meaning of §1983. This Court affirmed, using exactly the same terminology: "We hold that neither a State nor its officials acting in their official capacities are persons under §1983." The sole reference in both opinions is to the nature of the *acts*, not to the form of the *action*. The principal question raised by these proceedings therefore is what this Court meant by the phraseology "acting in their official capacities."

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2. Although the primary force of Hafer's argument is that she was acting in her official capacity in discharging respondents and is therefore not a "person" subject to liability under 42 U.S.C. §1983 pursuant to Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989), notwithstanding respondents' attempt to characterize their actions as "personal capacity" law suits, Hafer has never conceded that respondents properly pleaded such an action. It is Hafer's position that, by reason of Will, it is the nature of the state official's conduct giving rise to the claim which governs whether an action is a "personal capacity" action, and not plaintiff's characterization thereof. At the very least, respondents' failure to assert in ten of their eleven complaints that Hafer was being sued in her personal capacity precludes their present contention as to the nature of the actions set forth in those complaints. See Brief of the National Association of Counties, et al., filed in support of petitioner.

The words, "*acting in their official capacities*," which the Court used to determine whether a state official is a "person" under 42 U.S.C. §1983, are not the same as the terminology "acting under color of state law," which governs whether a person is subject to liability under the statute and appears to be of more limited scope. Thus, a state official engaged in conduct "under color of state law" may not be acting in his "official capacity" and may remain subject to liability under §1983. On the other hand, a state official acting in his "official capacity" is not a person under the statute even though the acts may be performed "under color of state law."

The meaning of the Court's language in *Will* can be gleaned from a comparison of the conduct alleged in that case with that alleged in the only other decision by this Court discussing the imposition of damages liability against a state executive official, *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

Scheuer involved allegations that state officials, including the Governor of Ohio, had intentionally, wilfully and wantonly deployed the Ohio National Guard on the Kent State campus and in the same manner, ordered the Guard members to perform allegedly illegal actions which resulted in the death of plaintiffs' decedents. 416 U.S. at 235. These allegations concern an exercise of the State's police power and are no different than those which might be raised in any §1983 action against government officials for wrongfully directing the acts of state or local police in connection with their interaction with the public at large; the type of conduct which, as this Court recognized in *Scheuer*, is most likely to give rise to a claim under the statute. 416 U.S. at 244-45.

The action had been dismissed by the lower courts on the pleadings as barred by both the constitutional immunity of the 11th Amendment and common-law doctrine of absolute executive immunity. This Court, in reversing, held that neither immunity was applicable to the conduct as alleged, 416 U.S. at

237-49, but expressly declined to make a definitive determination as to the scope of immunity which was available in that case because of a lack of a factual record. 416 U.S. at 249-50.[3]

In *Will*, on the other hand, the plaintiff, an employee of the Michigan Department of State Police, sought to impose damages liability against the Department and the Director of State Police in the Michigan state courts on the ground that he had been improperly denied a promotion by the Director in violation of 42 U.S.C. §1983 on the basis of the political activities of his brother. The conduct thus related solely to the management of the state government in general and the administration of state employment policies in particular. As part of the proceedings in the state courts, a factual determination was entered by the Michigan Civil Service Commission that Will had been denied promotion because of "*partisan considerations*," a clear violation of his constitutional rights. 491 U.S. at 60-61.

The Michigan trial court refused to dismiss plaintiff's claim, ruling that defendants were "persons" under 42 U.S.C. §1983. On appeal, the Michigan Court of Appeals reversed as to the Department, holding that a State was not a "person," but remanded as to the Director for a determination of his possible immunity. This decision was affirmed by the Michigan Supreme Court insofar as it held that the State, through the Department of State Police, was not a "person" and reversed as to the Director – for the express reason that a "state official acting in his or her official capacity also is not such a person." 491 U. S. at 61. This Court affirmed.

Will and *Scheuer* demonstrate that it is the *function* of the executive conduct involved that is dispositive of the issue whether a state official is a "person" within the meaning of §1983. *Scheuer* involved an alleged abuse of the state police power, which conduct was under color of state law but not in the Governor's "official capacity." The acts of the Director of State Police in *Will* in refusing to promote the plaintiff for partisan reasons, on the other hand, involved the management of the

3. Moreover, in Scheuer, the Court was only faced with the question whether the Governor was "acting under color of state law," and did not address the issue whether the Governor was acting in his "official capacity."

State's governmental structure. Although allegedly under color of state law and in violation of Will's constitutional rights, the Director's conduct was within his official capacity.

Read together, *Will* and *Scheuer* appear to establish the following principles applicable to the determination that a state official is acting in his or her official capacity and therefore not a "person" under 42 U.S.C. §1983:[4]

> (i) *Internal governmental operation.* The conduct must relate to an internal state governmental *function*[5] and not to the exercise of state authority over its citizens at large.[6]
>
> (ii) *Routine and frequently utilized function.* The conduct must be of a type, such as the hiring, promotion, discipline or discharge of state employees, which is performed routinely by state officials and which places these officials at great risk of being subject to numerous insubstantial and vexatious law suits. See discussion at pp. 9-12 *infra*.

4. The same analysis is equally applicable in determining whether or not state officials are acting in their official capacities so as to be protected from a suit in a federal court under the Eleventh Amendment. Will, 491 U.S. at 66-67.

5. This Court has consistently noted that the liability of government officials for alleged constitutional violations for a particular type of conduct must be determined through an analysis of the function being performed by that conduct, and not by the nature of the official's position. Scheuer v. Rhodes, 416 U.S. at 243; Harlow v. Fitzgerald, 457 U.S. 800, 810-13 (1982); Forrester v. White, 484 U.S. 219, 224 (1988).

6. Respondents have not cited, and research on behalf of Hafer has not revealed, any decision by this Court in the 120 years since the enactment of the Civil Rights Act of 1871, 17 Stat. 13, holding that a state executive officer could be subject to damages liability arising out of acts relating to internal government operations. See compilation of §1983 cases cited at notes 19, 20 and 21 of Justice Frankfurter's dissenting opinion in Monroe v. Pape, 365 U.S. 167, 213-15 (1961). Forrester v. White, 484 U.S. 219 (1988), decided one year prior to Will, does not so hold. That decision merely involves a determination that the absolute immunity enjoyed by state judges from liability under 42 U.S.C. §1983 does not apply to their administrative acts in connection with the employment of state parole officers, employees of the judicial, as distinguished from the executive, branch of state government.

(iii) *Adequate alternative remedy.* The consequences of the conduct can be rectified by an adequate alternative remedy such as prospective declaratory or injunctive relief.[7]

(iv) *In accordance with state law or policy.* The conduct must be pursuant to state law or in accordance with policy established by a state official having the final decision-making authority in connection with the alleged acts.[8]

(v) *Authorized official.* The actor must be a state executive branch official authorized to act with respect to the function at issue.

(vi) *Factual record.* To the extent that there is a question as to the nature of the conduct, there should be a factual record and a full and fair opportunity for the plaintiff to demonstrate that the acts were not performed within the official's "official capacity."[9]

7. In Scheuer, the plaintiffs' decedents had died as a result of the alleged actions of the governor and the award of damages was the only remedy available.

8. Under Monell v. New York City Dept. of Social Services, 436 U.S. 658, 690-95 (1978), municipal governments, although "persons" under 42 U.S.C. §1983, are not liable for damages thereunder on the basis of *respondeat superior* for acts committed by their employees or officials, "under color of state law," unless the alleged conduct was pursuant to governmental policy. That policy, this Court has held, can be established by a *single* decision by a government official having final decision-making authority with respect to the alleged conduct. Pembaur v. Cincinnati, 475 U.S. 469 (1986). Prior to Will, several panels of the Court of Appeals for the Second Circuit expressly held that state officials acting pursuant to government policy were therefore *acting* in their "official capacities" and were not subject to liability under 42 U.S.C. §1983. Rodriguez v. James, 823 F.2d 8 (2d Cir. 1987); Jones v. Smith, 784 F.2d 149 (2d Cir. 1986). ***But see*** Farid v. Smith, 850 F.2d 917 (2d Cir. 1988).

9. That factual record should be created, to the extent practicable, in accordance with summary judgment procedures to relieve state officials from the burden and expense of litigating claims against them for acts committed in their official capacities. The factors recited above as governing the determination whether a state official is acting within his "official capacity" are objective and easy to apply and can thus be evaluated without resort to a full-scale trial on the merits. Cf. Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982); Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985).

These principles necessarily derive from the holding of this Court in *Will* that States are not "persons" under 42 U.S.C. §1983 – States can only function through acts of their elected and appointed officials – and our system of federalism which is based on the existence of separate and independent state governmental entities. These factors, moreover, are clearly applicable to the alleged conduct of Hafer herein:

1-2. Hafer's conduct in discharging respondents involved the internal state governmental *function* concerning employment within the Pennsylvania Auditor General's Department; the state agency entrusted with the responsibility of assuring the proper collection and expenditure of state funds.[10]

3. Respondents' claims that their federal constitutional rights were violated by reason of their discharge from state employment can be remedied, as it already has been in the case of seven of the Melo respondents,[11] by reinstatement to their former employment. Damages are thus not essential to the redress of these claims.

4-5. Respondents' discharge was in accordance with policies established by Hafer following her inauguration as Auditor General to fire all those employees who benefitted from the job-buying scheme within the Department (Melo respondents) and to overhaul the Department by replacing certain managerial level employees by promotion within the Department (Gurley respondents). As both the District Court and Court of Appeals expressly recognized,[12] Hafer, as Auditor General, had final decision-making authority under Pennsylvania law in connection with the establishment and effectuation of the Department's employment policies.

6. Although there can be little doubt, as a matter of law, that Hafer, in discharging respondents, was acting in her official

10. See Brief for Petitioner, pp. 14-15 n.20

11. See copies of state arbitration awards which have been lodged with the Clerk of the Court in support of respondents' Brief herein. These awards also provide for payment to the respondents of retroactive back pay and interest thereon. Moreover, six of the Melo respondents joined in a Complaint (J.A. 37) purporting to sue Hafer in her "official capacity" and requesting reinstatement to their public employment.

12. See Brief for Petitioner, pp. 14-15.

capacity under the first five factors set forth above, she nevertheless did present to the District Court in support of her Motion for Summary Judgment (J.A. 56) a voluminous factual record, in the form of documentary and testimonial exhibits (J.A. 57-172) evidencing the official nature of her conduct, as well as the lack of merit of respondents' claims that their constitutional rights had been violated.[13] Respondents filed counter exhibits in opposition to Hafer's motion with respect to the question of Hafer's "capacity" (J.A. 174-237) and *expressly acknowledged that there was a sufficient record before the District Court to decide that issue*.[14]

Based on this record, the District Court concluded that Hafer was acting in her "official capacity" in discharging the respondents and expressly entered *summary judgment* in her favor. In the absence of any evidence to the contrary, that decision must be upheld under the principles established by *Will*. It cannot be explained away, as the Court of Appeals and respondents have attempted to do, by mischaracterizing[15] the effect of the District Court's ruling as merely dismissing respondents' actions on the pleadings. This was not how the matter was presented to the District Court and certainly not how it was decided. Respondents cannot now change the procedural history below to justify the insufficiency of their own factual presentation.

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13. See Note 18 *infra*.

14. Respondents' Brief in Opposition to [Hafer's] Motion for Summary Judgment, pp. 1-3, a copy of which has been lodged with the Clerk of this Court in support of respondents' Brief herein. Respondents explicitly limited their claim of lack of opportunity for discovery to the issues raised by Hafer directed at the merits of respondents' claims and proceeded to address at length the question of Hafer's "capacity" (*Id.* at pp. 2-3).

15. The lengthy discourse by the Court of Appeals in this respect, Melo v. Hafer, 912 F.2d 628, 633-34 (3d Cir. 1990), completely ignores respondents' own concession that the issue of Hafer's "official capacity" under the Eleventh Amendment and 42 U.S.C. §1983 was properly before the District Court on summary judgment (see Note 14 *supra)* and repudiates the Court of Appeals' own decisions strictly enforcing the requirements of Fed.R.Civ.P. 56(f) prescribing the procedures to be followed in seeking additional time for discovery in response to a motion for summary judgment (Brief for Petitioner, pp. 7-8 n. 14).

In summary, *Will* should be interpreted as establishing a rule that state officials *acting* in their official capacities, as determined in accordance with the above standards, are not "persons" under 42 U.S.C. §1983. Applying these standards to the instant matter, the only conclusion possible is that Hafer, in discharging respondents, was acting in her official capacity and that the decision of the District Court to that effect in granting summary judgment in favor of Hafer must be affirmed.

II. The Holding in *Will* Provides a Necessary Protection for State Officials From Vexatious Claims Arising Out of Acts Performed in Their Official Capacities.

The Court has recognized that the threat of innumerable "personal capacity" damage actions against state officials for their official conduct serves as a real deterrent to the proper exercise of their discretion in administering state governments. *Scheuer v. Rhodes*, 416 U.S. at 240-42; *Forrester v. White*, 484 U.S. 219, 223 (1988). These decisions conclude that the imposition of personal damages liability on state officials, and the extent of any relief therefrom, must be based upon an examination of the governmental function involved. See Note 5 *supra*. The holding in *Will*, in conformity with that authority, protects state officials from vexatious litigation with respect to a function which does subject them to numerous law suits.

It is axiomatic that a State, as a body politic, can operate only through its employees, and it is public knowledge that in our present society the number of employees necessary to operate a state government has increased enormously.[16] Thus, one of the primary functions performed by elected and appointed state executive officials is the hiring, promotion, discipline and discharging of state personnel and establishment of policies and practices relating thereto, so as to insure the most efficient management of state government for the benefit of the public. The employees at all times remain the employees of the

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16. Between 1970 and 1987, the total number of state employees in the United States increased nearly 50% from 2,755,000 to 4,115,000. U.S. Bureau of the Census, *Statistical Abstract of the United States*: 1990 (110th ed.), p. 299, Table No. 487.

State, not the officials responsible for their employment, and all acts taken by state officials with respect to that employment are taken on behalf of the State.

As the necessity for exercising discretion in connection with the employment of state personnel has increased commensurate with the enlarged number of state employees, so has the potential for being sued with respect thereto. Every employee discharged, or treated in a manner believed to be unwarranted, even if for good cause, has a grievance against the officials responsible for the discharge or treatment, and many now give vent to that grievance by initiating "personal capacity" damage actions against those officials.[17] Thus, in performing their employment management functions, state officials face a situation similar to judges, whose immunity from liability under 42 U.S.C. §1983 has been justified by this Court in *Mitchell v. Forsyth*, 472 U.S. at 521-22, as follows:

> The judicial process is an arena of open conflict, and in virtually every case there is, if not always a winner, at least one loser. It is inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict....

In *Harlow* and *Forrester*, this Court has expressed its belief that the objective qualified immunity rule established in *Harlow v. Fitzgerald* will provide adequate protection to public officials from being required to expend time and money in the defense of vexatious damage claims through the use of summary motion

17. Will; Melo v. Hafer; Rice v. Ohio Dept. of Transp., 887 F.2d 716 (6th Cir. 1989), vacated and remanded, 110 S.Ct. 3232 (1990); and Nix v. Norman, 879 F.2d 429 (8th Cir. 1989) are representative of the civil rights actions being instituted against state executive officials arising out of their employment management function. Rice was remanded to the Court of Appeals for reconsideration of its determination that the failure to promote a state employee for political reasons was constitutionally permissible in light of this Court's decision in Rutan v. Republican Party of Illinois, 110 S.Ct. 2729 (1990). In remanding, the Court did not consider the Court of Appeals' alternative holding that the individual defendants, although *sued* "in their official and personal capacities" were *acting* in their "official capacities" and were thus not "persons" under 42 U.S.C. §1983.

procedures. These procedures do not always work in employment civil rights cases. Pleadings can be framed to create colorable factual issues that are difficult to resolve on summary judgment, or as was done in these proceedings delaying tactics can be employed[18] to discourage summary disposition even though the law is clear, as it is in Pennsylvania, that except as expressly authorized by law, public employment is at will and employees may be terminated without reason.[19]

It is thus clear that there is a special need to alleviate the great burdens being placed upon *state* officials in defending, in their *personal* capacities, the proliferation of §1983 cases being instituted against them arising out of their *official conduct* in the management of the State's employment practices. The balancing of the policy considerations, at least with respect to the performance of this *necessary internal government function*, compels a greater protection for state executive officials than afforded by the qualified immunity rule. The solution, as reached through

18. In support of her Motion for Summary Judgment, Hafer presented considerable factual material (J.A. 57-172) and legal argument relating to the merits of respondents' claims and thus her entitlement to qualified immunity. Respondents chose to frustrate the summary judgment procedures and to delay the disposition of their actions by refusing to present contradictory evidence or argument concerning any issue other than that pertaining to Hafer's capacity. Although claiming lack of opportunity for discovery, respondents neither attempted to initiate discovery nor requested additional time to do so by the requisite filing of an affidavit under Fed.R.Civ.P. 56(f). Brief for Petitioner, pp. 7-8 n. 14. Having failed either to oppose Hafer's factual presentation or to submit a Rule 56(f) affidavit, respondents are bound by the uncontradicted factual statements set forth in Hafer's affidavits and documents. These uncontroverted facts show that (i) respondents did not have any property right to their public employment under Pennsylvania law, or in the case of the Melo respondents, had been discharged after a pre-termination investigation and hearing, and has been afforded a full post-termination arbitration proceeding; (ii) Hafer did not publicize the identity of any of the discharged job-buyers, including the Melo respondents, in violation of their liberty rights; and (iii) Hafer had no knowledge of respondents' political affiliations prior to the institution of respondents' actions in the District Court. These facts support entry of summary judgment in favor of Hafer on the merits and on the ground of qualified immunity.

19. Scott v. Philadelphia Parking Authority, 402 Pa. 151, 166 A.2d 278 (1960); Cooley v. Pennsylvania Housing Finance Agency, 830 F.2d 469 (3d Cir. 1987).

Will, is to recognize that state officials, in conducting their employment management discretion, are acting in their "official capacities," and are therefore not "persons" under 42 U.S.C. §1983.

This result does not substantially limit the scope of the statute. It will leave state executive officials subject to liability for their acts which affect the citizens of the State in general (rather than as state employees), and local governmental officials subject to liability for any of their acts under color of state law.[20] State employees will further retain the right to prospective relief against state officials in their official capacities to remedy any violation of their constitutional rights.

The fundamental issue in this case arises from the tension between (1) this Court's decisions in *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980), and *Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729 (1990), holding that the First Amendment forbids government officials to discharge or threaten to discharge public employees for not being supporters of the political party in power and forbids promotion, transfer, recall and hiring decisions in state government on the basis of party affiliation and support, and (2) respondents' contention that, in cases brought against state executive officials arising out of discharge, hiring, promotion, transfer and recall, 42 U.S.C. §1983 may be utilized to impose on state executive officials direct, *personal liability* for money damages (and potentially for attorney's fees under the Civil Rights Attorneys Fee Award Act of 1976, 42 U.S.C. §1988) for decisions relating to these fundamental operations of state government.

In this case, respondents advocate a position that would require full-scale discovery and trial of claims of pretextual, politically-motivated discharge of employees of the Pennsylvania Auditor General's Department who were implicated by a federal investigation in an illegal political job-buying scheme. Hanging

20. Although local officials also exercise some governmental discretion in the hiring and firing of employees, since Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978), §1983 actions relating thereto are generally directed against the governmental unit alone or as co-defendant with the responsible officials, and the expenses of defense are for the most part borne by the local government.

in the balance is the risk of personal liability of the Pennsylvania Auditor General for carrying out basic duties of her office. From a broader perspective, respondents' position would introduce the risk of personal liability for money damages for state executive officials for countless daily decisions relating to employee firing, hiring, promotion, transfer or recall involving the approximately 4,000,000 employees of state governments. The resulting avalanche of §1983 litigation and the chilling effect of state executive officer personal liability for money damages on the proper exercise of a basic function of state government simply cannot have been within the intent of the Congress that enacted §1983.

Unless and until this Court reconsiders and overrules *Elrod*, *Branti*, and *Rutan*,[21] the only protection against the potentially catastrophic and inhibiting consequences of unlimited personal liability of state executives in this sphere of activity is this Court's holding in *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), that state officials acting in their official capacities are not "persons" within the meaning of 42 U.S.C. §1983.

21. Although petitioner has not presented in the petition for writ of certiorari in this case the issue whether this Court should reconsider and overrule the decisions in those cases, and acknowledges that this Court ordinarily does not decide questions not raised in the lower court or questions not presented in the petition for writ of certiorari, petitioner would respectfully invite the Court to reconsider those decisions and to direct briefing of the issue in this case. City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 257 (1981) (Court afforded plenary review of the "novel" and "important" question of punitive damages in §1983 litigation against municipalities); Carlson v. Green, 446 U.S. 14, 17 n.2 (1980) (Court is not precluded from deciding issues not presented below); Stern, Gressman & Shapiro, Supreme Court Practice (6th ed.) at 363-369.

CONCLUSION

The Order of the United States District Court for the Eastern District of Pennsylvania, dated September 28, 1989, granting Hafer's Motion for Summary Judgment correctly applies the standards established in *Scheuer* and *Will* and should be reinstated. The judgment of the United States Court of Appeals for the Third Circuit should be reversed.

Respectfully submitted,

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